Civil District Court for the Parish of Orleans
STATE OF LOUISIANA

No: 2015 - 04501

Division/Section: D-12

SEWELL, ELIZABETH ET AL
versus
SEWERAGE AND WATER BOARD OF NEW ORLEANS

Date Case Filed: 5/11/2015

NOTICE OF SIGNING OF JUDGMENT

TO:

Daniel A Meyer Esq 33278
855 Baronne Street, Third Floor
New Orleans, LA 70113

Joseph B Morton Esq 19072
615 Baronne St
300
New Orleans, LA 70113

Christopher D Wilson Esq 27142
615 Baronne St
Ste 300
New Orleans, LA 70113

Kendale J Thompson Esq 37331
615 Baronne St Ste 300
New Orleans, LA 70113

Alexis A Butler Esq 32376
201 St. Charles Ave.
2500
New Orleans, LA 70118

Michael Whitaker
The Whitaker Law Firm, APC
100 Dolores St.
Carmel, CA 93923

In accordance with Article 1913 C.C.P., you are hereby notified that Judgment in the above entitled and numbered cause was signed on November 27, 2018

New Orleans, Louisiana
November 27, 2018

Mallie Lightstreet
~~MINUTE~~ CLERK
Law

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 2015-4501 **DIVISION "D"** **SECTION 12**

ELIZABETH SEWELL, ET AL.

VERSUS

SEWERAGE & WATER BOARD OF NEW ORLEANS

&

NO. 2015-10344 **DIVISION "D"** **SECTION 12**

LEON GREENBLATT

VERSUS

SEWERAGE & WATER BOARD OF NEW ORLEANS

FILED: _____ _____
DEPUTY CLERK

JUDGMENT FOR RESIDENTIAL TRIAL GROUP B AND LEON GREENBLATT

This matter came before the Court for trial on the 15th, 16th, 17th, and 18th days of October, 2018.

Present:

Daniel A. Meyer (La. Bar # 33278)
Alexis A. Butler (La. Bar # 32376)
Michael T. Whitaker (*Pro Hac Vice*)
Counsel for *Sewell* Plaintiffs

Darleen M. Jacobs (La. Bar # 07208)
Hunter P. Harris, IV (La. Bar # 26652)
Counsel for Leon Greenblatt

Chris D. Wilson (La. Bar # 27142)
Joseph B. Morton, III (La. Bar #19072)
Kendale Thompson (La. Bar # 37331)
Counsel for Sewerage and Water Board of New Orleans

This Judgment concerns the following group of plaintiffs:

Plaintiffs:

Julia Kingham and Rick Boehm—4414 Baronne Street
Beryl Mundee—4321 S. Libtery Street
Dr. Shaminder and Nomita Gupta—2212 Napoleon Avenue
Jenelle Slobof and Neal Cohen—4437 S. Liberty Street
Jeannie and Bobby Gaddy—2134 Napoleon Avenue
2501 Napoleon Condominium Association
Richard O'Neil—2501 Napoleon Avenue, Unit A
Anne Drown—2501 Napoleon Avenue, Unit B
Dr. Bryan and Meghan Payne—2501 Napoleon Avenue, Unit C
Jori Zlatkiss—2501 Napoleon Avenue, Unit D

&

Leon Greenblatt—2601-03 & 2605 Napoleon Avenue

In consideration of the law and evidence, the Court hereby renders the following:

IT IS ORDERED, ADJUDED, AND DECREED that the plaintiffs suffered an inverse condemnation.

IT IS FURTHER ORDERED, ADJUDED, AND DECREED that the Sewerage and Water Board of New Orleans ("SWB") is liable for damages owed to plaintiffs under the theory of inverse condemnation.

IT IS FURTHER ORDERED, ADJUDED, AND DECREED that SWB is the owner of the SELA Project.

IT IS FURTHER ORDERED, ADJUDED, AND DECREED that the SELA Project construction activities caused new damage to, or exacerbated pre-existing damage within, the plaintiffs' properties. The SELA Project caused plaintiffs to suffer a loss of use and enjoyment of their properties.

IT IS FURTHER ORDERED, ADJUDED, AND DECREED that SWB is strictly liable under Louisiana Civil Code article 667 for ultra-hazardous pile driving which occurred near the properties in the Napoleon II phase of the SELA project.

IT IS FURTHER ORDERED, ADJUDED, AND DECREED that SWB is strictly liable under Louisiana Civil Code articles 2317 and 2317.1.

IT IS FURTHER ORDERED, ADJUDED, AND DECREED that SWB failed to demonstrate that fault should be allocated to a separate entity pursuant to the comparative fault statutes.

IT IS FURTHER ORDERED, ADJUDED, AND DECREED that the Court does not find that plaintiffs are entitled to relocation damages or damages to cover the cost of moving and storing contents of their homes during repairs.

IT IS FURTHER ORDERED, ADJUDED, AND DECREED that SWB owes damages to plaintiffs in the following amounts:

1. **Julia Kingham and Rick Boehm—4414 Baronne Street**

Property Damage:	$39,380.92
Loss of Use and Enjoyment:	$48,875.20
Total:	$88,256.21

2. **Beryl Mundee—4321 S. Liberty Street**

Property Damage:	$39,952.76
Loss of Use and Enjoyment:	$34,069.36
Total:	$74,022.12

3. **Dr. Shaminder and Nomita Gupta—2212 Napoleon Avenue**

Property Damage:	$36,647.50
Loss of Use and Enjoyment:	$73,507.20
Total:	$110,155.00

4. **Jenelle Slobof and Neal Cohen—4437 S. Liberty Street**

Property Damage:	$17,562.46
Loss of Use and Enjoyment:	$6,874.80
Total:	$24,437.26

5. **Jeannie and Bobby Gaddy—2134 Napoleon Avenue**

Property Damage:	$10,688.35
Loss of Use and Enjoyment:	$3,215.48
Total:	$13,903.83

6. **2501 Napoleon Condominium Association**

Property Damage:	$25,129.37
Loss of Use and Enjoyment:	$0.00
Total:	$25,129.37

7. **Richard O'Neil—2501 Napoleon Avenue, Unit A**

Property Damage:	$12,811.64
Loss of Use and Enjoyment:	$24,195.36
Total:	$37,007.00

8. **Anne Drown—2501 Napoleon Avenue, Unit B**

Property Damage:	$14,156.58
Loss of Use and Enjoyment:	$9,619.02
Total:	$23,775.60

9. **Dr. Bryan Payne—2501 Napoleon Avenue, Unit C**

Property Damage:	$22,883.87
Loss of Use and Enjoyment:	$26,105.52
Total:	$48,989.39

10. **Jori Zlatkiss—2501 Napoleon Avenue, Unit D**

Property Damage:	$17,092.43
Loss of Use and Enjoyment:	$21,011.76
Total:	$38,104.19

11. **Leon Greenblatt—2601-03 Napoleon Avenue & 2605 Napoleon Avenue**

Property Damage:	$94,429.51
Lost Rents:	$0.00
Diminution of Property Value:	$0.00
Emotional Distress:	$0.00
Total:	$94,429.51

IT IS FURTHER ORDERED, ADJUDED, AND DECREED that pursuant to the above calculations, the plaintiffs in Residential Trial Group B are hereby awarded a money judgment

against SWB in the amount of FOUR HUNDRED EIGHTY-THREE THOUSAND, SEVEN HUNDRED SEVENTY-NINE DOLLARS AND NINETY-SEVEN CENTS ($483,779.97).

IT IS FURTHER ORDERED, ADJUDED, AND DECREED that pursuant to the above calculations, plaintiff Leon Greenblatt is hereby awarded NINETY-FOUR THOUSAND, FOUR HUNDRED TWENTY-NINE DOLLARS AND FIFTY-ONE CENTS ($94,429.51).

IT IS FURTHER ORDERED, ADJUDED, AND DECREED that pursuant to Louisiana Code of Civil Procedure article 1920, Louisiana Revised Statute § 13:3666, Louisiana Revised Statute § 13:4533, and Louisiana Revised Statute § 13:5111, the Court awards reasonable attorney fees to plaintiffs, and SWB is taxed with the costs associated with the prosecution of this matter, all to be determined pursuant a rule to show cause.

RENDERED, READ, AND SIGNED this 29th day of November, 2018, in New Orleans, Louisiana.

HONORABLE NAKISHA ERVIN-KNOTT
JUDGE, CIVIL DISTRICT COURT

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 2015-4501 **DIVISION "D"** **SECTION 12**

ELIZABETH SEWELL, ET AL.

VERSUS

SEWERAGE & WATER BOARD OF NEW ORLEANS

&

NO. 2015-10344 **DIVISION "D"** **SECTION 12**

LEON GREENBLATT

VERSUS

SEWERAGE & WATER BOARD OF NEW ORLEANS

FILED: _____ _____
DEPUTY CLERK

REASONS FOR JUDGMENT

I. FACTS AND EVIDENCE

A. Background

This is the second trial this Court has heard regarding the claims made by various homeowners and businesses against the Sewerage & Water Board of New Orleans ("SWB") for damages allegedly caused by the South Louisiana Urban Drainage Program ("SELA"). On April 25, 2018, this Court rendered a thirty-four page judgment finding SWB liable to the first set of plaintiffs, referred to as Residential Trial Group A. For reasons similar to the ones rendered in the Court's judgment for Residential Trial Group A, the Court finds SWB liable for the damages suffered by the current plaintiffs. As it pertains to the general structure and control of the SELA project, the Court will rely on evidence submitted at this trial and take judicial notice of evidence submitted in the previous trial.

The SELA project involved the installation of canals and consisted of several federally sponsored projects aimed at improving the local drainage system. The project consisted of seven phases: Claiborne I, Claiborne II, Jefferson I, Jefferson II, Napoleon II, Napoleon III, and Louisiana I (the "SELA Project"). The plaintiffs in this trial were all affected by the Napoleon II phase of the project. Approximately three hundred homeowners have joined the *Sewell* lawsuit. The plaintiffs in the instant matter, referenced as Residential Trial Group B, include nine sets of

homeowners and a condominium association: Julia Kingham and Rick Boehm, Beryl Mundee, Dr. Shaminder and Nomita Gupta, Jenelle Slobof and Neal Cohen, Jeannie and Bob Gaddy, Richard O'Neil, Anne Drown, Dr. Bryan Payne, and 2501 Napoleon Condominium Association. Business owner, Leon Greenblatt, also joined in suit and had his claims heard in conjunction with Residential Trial Group B. Plaintiffs seek to hold SWB liable for damages pursuant to multiple theories of recovery, including inverse condemnation, strict liability, and negligence. SWB has denied any and all liability. SWB asserts a defense of comparative fault, denies negligence or strict liability, and argues that inverse condemnation is inapplicable.

SWB has maintained that the SELA project was constructed under the administration of the project's federal sponsor, the United States Army Corps of Engineers ("USACE"), and that USACE and the contractors who performed construction work on the project should be held liable. SWB filed multiple third-party claims against the contractors selected by USACE for the SELA Project. The third-party contractors effectively removed these claims to the United States District Court for the Eastern District of Louisiana. There, the presiding judge dismissed SWB's third-party claims upholding the contractors' defense of government contractor immunity.

1. Contractual Agreements Establishing the SELA Project

In 1997, the Army (referred to in the contracts as the "Government") and SWB entered into a Project Cooperation Agreement ("PCA") for the construction of certain work to improve the interior drainage system and reduce flood-related damage in Orleans Parish.

On January 16, 2009, the Army and the Coastal Protection and Restoration Authority of Louisiana ("CPRA") entered into an agreement called the Project Partnership Agreement ("PPA"). The PPA defines CPRA as the "non-federal sponsor" and identifies the multiple phases of the SELA Project. The PPA outlines the "65/35" cost share arrangement between the Army and the non-federal sponsor. The agreement authorizes the Army to allocate money to fund 65% of the cost of the project and states that the non-federal sponsor would share 35% of the cost. Additionally, the PPA provides that the non-federal sponsor would enter into a Cooperative Endeavor Agreement with SWB for the performance of the non-federal sponsor's obligations under the PPA.

Also on January 16, 2009, SWB and CPRA entered into the Cooperative Endeavor Agreement ("CEA"). This agreement would form the basis upon which SWB operated in conjunction with the State of Louisiana and the USACE for the performance of all SELA projects.

The CEA provides in parts:

> WHEREAS, JP [Jefferson Parish] and SWBNO [SWB] have been solely responsible, as between JP and SWBNO and the Government for any responsibilities and/or obligations undertaken under the PCAs, including the providing of funding, land, easements, and right of way acquisition, and various types of in-kind work for the Project;
>
> . . . .
>
> WHEREAS, CPRA and JP and SWBNO are entering into this Agreement for the purpose of having CPRA sign the SELA PPA as the Non-Federal Sponsor, as required by the Government, but to continue to recognize JP's and SWBNO's jurisdiction and primary participation **as the non-federal local entities that will be directly partnering with the Government in carrying out the design and construction of the Project and as the entities that will undertake and be responsible for the operation, maintenance, repair, replacement, and rehabilitation of their respective portions of the Project once it or functional portions thereof are completed;**
>
> WHEREAS, **CPRA will in fact delegate in whole or in part its responsibilities of the Non-Federal Sponsor under the SELA PPA to JP and SWBNO,** which responsibilities fall within the respective constitutional and statutory purposes, duties, and authorities of JP and SWBNO, and JP and SWBNO desire to accept and perform their respective purposes, duties, authorities, and responsibilities; and
>
> WHEREAS, CPRA, and JP and SWBNO intend for this Agreement to provide for the respective obligations and responsibilities of each party in relationship to each other and in relationship to the Government relative to the obligations and responsibilities assumed under the SELA PPA to be signed between CPRA and the Government . . .
>
> . . . .

IV. Hold Harmless and Indemnify

> . . . .
>
> B. As to those portions of the Project under its authority and jurisdiction and care, custody, and control, SWBNO agrees and obligates itself and its successors and assigns to defend, indemnify, save, protect, and hold harmless CPRA and its successors, officers and employees against any and all claims, demands, suits, actions, judgments, attorney's fees, or costs arising or allegedly arising out of its responsibilities enumerated and undertaken herein, or any violation of Louisiana or Federal law or regulations, or any negligent act, omission, operation, or work by SWBNO or its employees, agents, representatives, or contractors, except for damages due to the fault or negligence of CPRA, its employees, or its contractors.
>
> C. To the extent required by CPRA as the Non-Federal Sponsor under the SELA PPA, JP and/or SWBNO shall hold and save the Government free from all damages arising from design, construction, operation, maintenance, repair, rehabilitation, and replacement of the Project, except for damages due to the fault or negligence of the Government or its contractors.

(Emphasis added).

These agreements show that the CPRA executed the PPA as the non-federal sponsor for and on behalf of SWB so that SWB could assume all of the CPRA's contractual responsibilities and obligations in order to execute the SELA Project. Moreover, the agreements show that SWB would indemnify the CPRA and the Government from damages arising out of the construction of the project, excluding damages due to negligence of the CPRA, the Government, or its contractors.

2. The SELA Project: USACE and SWB Roles and Responsibilities

SWB and USACE shared a number of responsibilities with regard to the design and execution of the SELA Project. Deposition transcripts and testimony from representatives of USACE and SWB were admitted into evidence.

SWB was responsible for the conceptual designs of the different phases of the SELA Project. John Fogarty Deposition p. 42, Aug. 10, 2016.[1] SWB retained consultants, known as "designers of record", who developed all of the plans for the project. *Id.* SWB maintained a Network and Drainage Engineering Department that acted as the department lead for SELA. Sewell, Ex. P58, p. 58. The consultants who designed the SELA projects reported to the department head of the Network and Drainage Engineering Department. *Id.* at 58-59. SWB had the ability to make recommendations to the design consultants. *Id.* at 62.

During the preliminary design stages, USACE went through a review process of the plans and specifications and provided comments back to SWB's designers of record. Fogarty Dep. pp. 42-43, Aug. 11, 2016.[2] USACE's process was known as BCOE, which stands for Biddability, Constructability, Operability, and Environmental Review. *Id.* at 42. There was an extensive comment process where USACE generated BCOE related opinions. *Id.* at 46.

SWB employed a SELA Project manager who was responsible for the oversight of the engineering firms and was there to resolve or take appropriate measures. *Id.* SWB coordinated with USACE on the actual construction of the project and reviewed the progress of the project. Fogarty Dep. p. 1317, Aug. 15, 2016.[3] USACE performed daily inspections to ensure that contractors built the box culverts in accordance with the plans and specifications. *Id.* at 66. At

[1] Referenced in Reasons for Judgment: Residential Trial Group A.
[2] Referenced in Reasons for Judgment: Residential Trial Group A.
[3] Referenced in Reasons for Judgment: Residential Trial Group A.

times, SWB and USACE performed walk-throughs together. *Id.* SWB had review and acceptance authority over design aspects of the SELA Project construction. Sewell, Ex. P58, p. 59.

In certain instances, SWB performed construction work. Fogarty Dep. p. 254, Aug. 10, 2016.[4] SWB performed an emergency valve repair, sewer main replacement, and parking lane repair. *Id.* at 254-255. SWB provided access to the lands, easements, and rights-of-way to build the drainage system. Sewell, Ex. P58, p. 88. SWB tied in the SELA drainage system with the existing drainage system. *Id.* at 89. At times, SWB coordinated with the contractors, for example to relocate or install new water mains. Fogarty Dep. p. 722, Aug. 12, 2016.[5] SWB did not select contractors for the work. *Id.* at 259. USACE was responsible for the award and the administration of the construction contracts. *Id.* SWB could not directly instruct the contractors to do something; instead, SWB had to go through USACE because USACE held the contract with the contractors. *Id.* at 261.

USACE established a Quality Assurance team that included Quality Assurance representatives on site at any time to monitor the contractor's operations. *Id.* at 948-49. SWB was not involved in the drafting of a Quality Assurance plan. *Id.* at 1810. USACE required contractors to submit a Quality Control plan that addressed the provisions in the contract. *Id.* at 960. SWB was not involved in drafting the contractor's Quality Control plans; those were drafted by the contractors. *Id.* at. 958.

SWB hired a forensic contractor, Leonard Quick of Quick and Associates, to perform background pre-construction inspections of the properties, install piezometers and inclinometers, and settlement reference points.[6] Fogarty Dep. 168, Aug. 10, 2016;[7] Sewell, Ex. P58, p. 56. SWB maintained a SELA Project Hotline whereby complaints were logged with the SWB. Fogarty Dep. p. 270, Aug. 10, 2016.[8] SWB received the complaints through their consulting firm and then passed along the complaints to the project manager for USACE who would then act on the complaint. *Id.* Additionally, USACE maintained its own separate hotline. *Id.* at 272.

---

[4] Referenced in Reasons for Judgment: Residential Trial Group A.
[5] Referenced in Reasons for Judgment: Residential Trial Group A.
[6] A piezometer measures groundwater. An inclinometer measures incline.
[7] Referenced in Reasons for Judgment: Residential Trial Group A.
[8] Referenced in Reasons for Judgment: Residential Trial Group A.

3. Anticipated Consequences of the SELA Project: Vibrations and Adverse Effects

Prior to the start of construction, SWB and USACE were aware that vibrations were a concern. Sewell, Ex. P58, p. 52; Fogarty Dep. 1125-26, Aug. 15, 2016.[9] USACE anticipated there would be vibrations due to pile driving, the operation of heavy equipment, excavations, and other construction activity. Fogarty Dep. 108, Aug. 10, 2016.[10]

A SELA brochure, made available on the SELA website and to patrons at SWB's public meetings, acknowledges there would be impacts to the surrounding areas due to construction of the SELA Project. *See* Sewell, Ex. P5. The brochure explains that noise and vibrations from moving and operating heavy construction equipment could have an impact on structures located within close proximity to the Zone of Impact ("ZOI").[11] *Id.* The brochure explains that scientific research has established the most significant factor to best indicate the potential for damage is peak particle velocity ("PPV"), measured in inches per second ("ips"). *Id.* The brochure stated that a limit of 0.25 ips PPV was "very conservative." *Id.*

In April of 2010, SWB signed a Programmatic Agreement ("PA"), which recognized that the SELA Project construction posed a risk of having adverse effects to properties located in the Uptown and Carrollton neighborhoods. Sewell, Ex. P1. The PA mapped out structures within the Area of Potential Effects ("APE") that were susceptible to indeterminate damage as a consequence of construction vibrations. *Id.* Additionally, the PA mapped out areas within the Construction Impact Zone ("CIZ") where the potential existed for soil vibration associated with project-related activities. *Id.* The PA provided that USACE would require contractors to perform work within a manner that would limit vibrations at the structure nearest to the site of construction activity to a maximum of 0.25 inches per second. *Id.*

During construction, vibration monitoring was accomplished by a monitor hired by the USACE. Fogarty Dep. 110, Aug. 10, 2016.[12] The contracts required the contractor's operations to remain under the .25 inches per second particle velocity as detected by vibration monitoring.

---

[9] Referenced in Reasons for Judgment: Residential Trial Group A.
[10] Referenced in Reasons for Judgment: Residential Trial Group A.
[11] "The construction ZOI is defined as the area in which it is more likely than not that damages will occur. Based on scientific data obtained to date, the ZOI's outer boundary is at the line formed upon the surface at a forty-five (45) degree angle from the bottom tip depth of driven sheet pile." Sewell, Ex. P5.
[12] Referenced in Reasons for Judgment: Residential Trial Group A.

Id. at 110. If a vibration exceeded .25 ips PPV, the vibration monitor was instructed to report it to the USACE inspector, and the USACE inspector was to report it to the contractor. *Id.* at 116.

As illustrated by the deposition testimony, the PA, and the SELA brochure, SWB and USACE anticipated adverse consequences due to construction related vibrations.

B. Fact Witnesses

1. Plaintiff: Julia Kingham

Julia Kingham purchased 4414 Baronne Street with her domestic partner, Rick Boehm, in 2000. Ms. Kingham testified that the home was in excellent condition when she purchased the property. The property was built in 1925 and includes a one-story residence with a basement. The home flooded during Hurricane Katrina, receiving twelve to fourteen inches of water. As a result of the flooding, the downstairs basement was gutted and a new flooring installed by pouring concrete over the existing slab floor. Ms. Kingham testified that there were no cracks in her home after the repairs from Hurricane Katrina were made. In 2007, the couple installed a pool.

Ms. Kingham owns a janitorial service and has worked from home since 2000. She first became aware of the SELA project in 2013 when the construction was on-going at Claiborne and Napoleon. The construction slowly moved closer to her home. The construction did not take place directly in front of her house, and the nearest timber pile was about 250 feet away from her home.

Ms. Kingham testified that work began around seven or eight each morning and would last from four to six hours a day. She could hear the workers jackhammering, pile driving, and driving diesel trucks to the construction site. She could also feel vibrations, which she described as being similar to a small earthquake. The vibrations would shake the house and sometimes made it difficult for her to work on her computer. The construction kicked up dust, damaged her windows, caused cracks to appear in her home, and lifted baseboards from the floor. Additionally, there were times when her driveway would be blocked by construction vehicles, and she could not park in front her home. While the construction was on-going, Ms. Kingham was unable to entertain guests because of the dust, noise, and lack of parking on her street. The construction lasted three years, and Ms. Kingham testified that the SELA construction had "robbed [her] of time and life."

2. Plaintiff: Beryl Mundee

Mrs. Beryl Mundee purchased 4321 S. Liberty Street in 1974. The home was originally built in 1894 as a shotgun double; but, it was converted into a single family dwelling in 1961. The home received eighteen to twenty inches of water during Hurricane Katrina, and the trees in front

of the property were uprooted. The home required extensive foundation work and was "stripped to the studs" for renovations in 2006. Mrs. Mundee was satisfied with the repairs made to the house and described it as a "delightful renovation." However, in November of 2009, Mrs. Mundee began noticing issues with the house, such as electronics failing and the air condition coils "dripping with black goo." Mrs. Mundee subsequently discovered that her home had been repaired with Chinese drywall. Once again, Mrs. Mundee had to renovate her home, and the work was completed to her satisfaction in June 2012.

In July 2012, street excavation began for the SELA construction. In September 2012, Quick and Associates came to Mrs. Mundee's home on behalf of the SWB. Mrs. Mundee testified that the construction appeared to be headquartered at Napoleon Avenue and S. Liberty Street because she witnessed heavy equipment located in that area. No pile driving or excavation took place in front of her property; however, Mrs. Mundee could still feel "incredible" vibrations in her home. Mrs. Mundee testified that "you could feel [the vibrations] in your blood." These vibrations were intermittent and not an everyday occurrence. Mrs. Mundee also testified that the construction activities were loud, and she had difficulty holding telephone conversations. Trucks and bulldozers would block S. Liberty Street, and there were times when she could not access her street from either direction.

As a retiree, Mrs. Mundee spent much of her time at her home. She wanted to enjoy her home after the Hurricane Katrina and Chinese drywall renovations. She is an active member of the Daughters of the British Society and would host monthly meetings at her home prior to the SELA construction. However, she became embarrassed by all the issues arising from the construction and stopped hosting these meetings. The construction "went on forever", and she made multiple complaints to the SWB hotline. Although she had been satisfied with her home after completion of the Chinese drywall renovations, Mrs. Mundee was "discouraged" in 2016 at the damages caused by the SELA construction.

3. Plaintiff: Nomita Gupta

2212 Napoleon Avenue was built in the early 1900s. Nomita Gupta and her family moved into the house in November 2011. At the time, an appraisal performed through Iberia Bank found that the "overall condition is very good with no repairs." SWB performed an inspection of the home at some point, but Mrs. Gupta could not remember when this occurred.

Mrs. Gupta testified that she first noticed the SELA construction sometime in the summer or fall of 2012, and the construction lasted until the spring or summer of 2016. The construction reached the front of her house in 2014, and it remained for a long period of time. Mrs. Gupta testified that she witnessed pile driving, jack hammering, and excavation activities in front of her property. Trucks would speed down her street, and everything would be covered in dust from the construction. Mrs. Gupta testified that she began to notice cracks on the front porch and in the plaster on the front windows as early as 2013. When the family first moved into the home, Mrs. Gupta testified that the porch had just one small hairline crack. Eventually, the cracks were everywhere, and the baseboards in the living room began to separate. In 2014, the Guptas converted one of the bedrooms into a family room and made repairs to the ceilings in the kitchen and bedroom areas.

Mrs. Gupta is an architect and interior designer who works from home, and she was home during the day when the construction was on-going. While she was still able to work from home, the construction activities were disruptive to her work. The Guptas made several complaints to the SWB hotline throughout the course of the construction. Mrs. Gupta testified that the family had a hard time parking near the home between 2014 to 2015. While the construction was on-going, Mrs. Gupta found it hard to entertain guests, especially whenever her in-laws and parents would visit from India, because equipment in the street would reduce parking availability.

4. Plaintiff: Jenelle Slobof

Jenelle Slobof and her husband purchased 4437 S. Liberty Street in October 2014. At the time, the home had been completely renovated and converted from a double into a single family dwelling. An inspection of the home revealed that the seller had made some repairs prior to the closing, but there were no cracks in the home at that time of the purchase.

Ms. Slobof originally thought the SELA construction involved normal road repair because she had not seen any heavy equipment. Eventually, she saw large machinery making its way down Napoleon Avenue to S. Liberty Street. While there was no pile driving or excavation directly in front of her house, she could still feel the vibrations from the heavy pile driving. The vibrations started around 7 A.M. and would end around 3 or 4 P.M. daily. Further, her work was often interrupted because she would not be able to hear over the noise of the construction.

The construction lasted for about two and a half years. Ms. Slobof's residence was about four dwellings away from the construction site; however, she was still able to feel the vibrations

and be disrupted by the noise from the construction. Ms. Slobof testified that her baseboards and floorboards separated during the construction; her porch also separated from her house. She also experienced issues with her air conditioner because of all the dust created by the construction. She had to have her house power-washed and the drains cleaned out.

Ms. Slobof tried to leave her home as much as possible during the construction but was unable to leave as often as she wanted. Construction vehicles sometimes made S. Liberty Street inaccessible, and she would have to park on Jena Street. Whenever family members visited town, they would stay at hotels to avoid the disruptive conditions at Ms. Slobof's residence. Ms. Slobof's mother and aunt both have autoimmune diseases that would be have been irritated by the dust kicked up from the construction. Ms. Slobof did not begin entertaining at her house again until April 2016.

5. Plaintiff: Jeannie Gaddy

The Gaddys purchased 2134 Napoleon Avenue in September 2013 and moved in on the same day. Mrs. Gaddy testified that the home had been newly rebuilt after a fire had destroyed it. The Gaddys used 2134 Napoleon as a second home and would visit about once a month. Mrs. Gaddy noticed construction equipment when the family first moved into the home. The realtor had told the family the construction was related to drainage works. The construction lasted about two and a half years and ended sometime in 2016.

Mrs. Gaddy testified that the construction work would begin around seven or eight in the morning. The construction activities caused dust to accumulate on the front porch and steps. She could also feel vibrations inside the home. Cracks formed in the exterior and interior walls of the home, the windows leaked, and the front porch separated from the home. The Gaddys made a claim for property damage through SWB in July 2015. Two men were sent out to inspect the home, and the family received a letter in February 2016 stating that SWB found the damages to be unrelated to the SELA project. Mrs. Gaddy testified that she had a hard time accessing the property while construction was on-going because the traffic in the area was bad. The family would use Loyola Avenue to access the garage, but Loyola Avenue would also be blocked at times. Despite these difficulties, she was still able to access her home.

6. Plaintiff: Richard O'Neil

Richard O'Neil is a contract industrial specialist with the Department of Energy and Atmos Strategic Services. He has lived in New Orleans for twenty-five years. He purchased 2501

Napoleon Avenue, Unit A in March 2012 for $160,000. Prior to purchasing the condominium, he had been searching for two years for a single person dwelling. Mr. O'Neil liked the fact that 2501 Napoleon was centrally located and that he could walk everywhere from his home. In addition, the residence served as a good Mardi Gras location. The condo had been completely rebuilt after Hurricane Katrina. This appealed to Mr. O'Neil because he will retire soon and does not want to put work into a property. Mr. O'Neil had an inspection performed in February 2010. Minor issues were found, such as water damage, minor cracking, and the floors curling, but the seller repaired all these issues to Mr. O'Neil's satisfaction prior to his purchase. After these repairs, Mr. O'Neil testified that the home was in "pristine condition."

Mr. O'Neil first noticed the SELA construction in 2013 when it arrived at his front door. The construction stretched from Napoleon Avenue to Freret Street, and he testified that he was "surrounded by it." He observed major equipment being used, such as pile driving equipment that created terrible noises and vibrations. Mr. O'Neil described the vibrations to be akin to a train passing by his home. There was "a parade of trucks" constantly coming and going from the construction site. Additionally, the construction created dust that accumulated on Mr. O'Neil's front porch. For five days a week, construction would start between six or seven in the morning and end around 4:30 P.M. The construction was completed sometime in 2015.

Mr. O'Neil lost his parking spot because of the construction. He was forced to park in the nursing parking lot on S. Robertson Street, but he could only access this lot between the hours of 6 P.M. to 7 A.M. He was concerned for his safety when walking to his home at night. Mr. O'Neil no longer has a parking spot in front of his house because the construction workers painted lines over his original spot once the construction was complete. While construction was on-going, Mr. O'Neil could not host friends at his home because there was nowhere to park. His oldest daughter also would not let his grandson visit because she thought the construction was too dangerous. Mr. O'Neil would ponder at times if he made the right decision to buy the condo and testified that he would not have purchased the unit had he known about the construction.

Mr. O'Neil testified that all the damages are located in the front of the property, closest to Napoleon Avenue. He slowly watched the front steps fall away from the main building. He testified that the plaster is falling off the steps, cracks have formed on the Freret Street side of the building, and the crown molding has separated at the corners in his home. He had to replace his front door because it would no longer lock, and the front gate to the residence also has the same problem. Mr.

O'Neil testified that none of these damages were present prior to the construction, and they only worsened over the course of the construction. Once the construction was complete, the damages stopped.

7. Plaintiff: Anne Drown

Anne Drown moved to New Orleans in January 2011. She purchased 2501 Napoleon Avenue, Unit B in September 2014. Prior to her purchase, she had the home inspected and appraised; no defects were found in the property at that time. Ms. Drown testified that the home was in excellent condition at the time of the purchase, and the condo did not have any cracks or separations. The unit also included an off-street parking spot. Ms. Drown used the unit as her primary residence until June 2017 when she moved to Florida with her husband. Currently, she uses the unit as a second home and returns to it every other week.

Ms. Drown testified that she first noticed the SELA construction in December 2014. The construction occurred directly in front of her condo, and she could see the construction from her front porch. The construction created lots of noise from the banging of equipment and the beeping of vehicles. Ms. Drown testified that she could also feel vibrations from the construction, especially whenever she sat on the patio. The construction was on-going for about twelve hours a day, six days a week over the course of a year and a half.

Ms. Drown testified that she first began noticing damages in late 2014 or early 2015. What had started as minor cracking progressively got worse as the construction continued. Ms. Drown testified that the baseboards separated from the walls, hairline cracks widened, and doors would not close correctly. No new damages have appeared since the construction ended.

The construction blocked the opening of Napoleon Avenue and Freret Street, and this hampered her ability to walk the neighborhood. Occasionally, Ms. Drown would have to work from home, and when she did, it was "almost impossible" to hold a conference call because of the noise from the construction. Further, her parking spot would sometimes be blocked, and this would make her late to work or force her to park across the street from the condo. Sometimes, she would be forced to park and walk across the street in the middle of the night in order to get to her residence.

Ms. Drown testified that the unit has become a financial burden to herself and her family. She and her husband have discussed renting out the unit but decided that the damages have

rendered the unit too unsafe for tenants. She also testified that the condo's value has diminished, and she would lose any money invested in it if she were to sell it now.

8. Meghan Payne

Meghan Payne is the wife of Plaintiff, Bryan Payne, who is the owner of 2501 Napoleon Avenue, Unit C. Mrs. Payne testified that her husband purchased the unit in June 2010, prior to when she and her husband were dating. She does not have an ownership interest in the unit. According to her testimony, there were no damages to the unit at the time of the purchase. Mrs. Payne moved into the unit in 2014. Unit C was the couple's primary residence until 2016.

Mrs. Payne testified that she had noticed the SELA construction in 2013 when it was behind the unit on Napoleon Avenue and Freret Street. The construction was completely underway on the neutral ground in front of the unit by the time she had moved into the property in 2014. She testified seeing oversized trucks, drilling equipment, and orange netting and fencing that would block walkways. The construction was on-going every day but Sunday. It would start around 6:30 AM and end around four or five in the evening. The construction was finally completed in June 2016.

Mrs. Payne testified that her husband had mentioned he had cracks in the unit in 2013. She first noticed the cracks when she moved into the residence in 2014. Most of the cracks in the unit travel horizontally along the length of the walls, but some are also vertical. There is damage to the foundation on the Freret Street side of the building. Mrs. Payne testified that she felt as if the damages only became worse while she lived in the unit.

While the SELA construction was on-going in front of the unit, Mrs. Payne was in nursing school. Therefore, she would sometimes be there during the day while the construction was being performed. She testified that she could feel vibrations a couple times of week. She could also hear the jackhammering and the drilling even when the doors of the unit were shut. Her husband used the parking spot that was included with the unit, and she parked on Freret Street. However, while Freret Street was torn up by the construction, she had to park on General Pershing Street. Her car and front porch would constantly be covered by dust and debris from the construction. Further, she could not entertain guests at the unit because of the lack of parking and overall inconvenience in trying to access the unit.

9. Plaintiff: Jori Zlatkiss

Ms. Jori Zlatkiss purchased 2501 Napoleon Avenue, Unit D in May 2013 for a price under $200,000. The unit was purchased as part of a "nesting" arrangement between herself and her ex-

husband. As part of the agreement, she and her ex-husband would alternate living at the unit while her children resided at the family home in Lakeview. When the nesting agreement ended in August 2017, the unit became her asset and her permanent residence. Ms. Zlatkiss testified that she had purchased the unit because it was newly renovated, had off-street parking, and a large balcony. She testified that she had done a personal inspection of the unit at the time of the purchase, and the unit had been "beautiful" with no damage.

Ms. Zlatkiss testified that she first noticed the SELA construction earlier in 2013 when it was closer to Claiborne, but the construction eventually moved down the block to her residence. Ms. Zlatkiss testified that she was "essentially surrounded" by the construction because her property is located at the corner of Napoleon Avenue and Freret Street. The construction occurred Monday through Saturday, starting at 6 A.M. and ending around 4 P.M. The construction was completed sometime in the middle of 2016.

Ms. Zlatkiss testified that cracks began appearing in her unit after the construction started. She first noticed small, horizontal cracks and watched as those cracks widened and elongated over time. Her baseboards cracked, and the crown molding separated from the wall. The foundation also started to form cracks. She testified that these damages worsened as the construction progressed, and even though the construction is complete, these damages continue to worsen.

Ms. Zlatkiss was home during much of the construction. She suffers from fibromyalgia, which requires her to keep a "rigid routine" in order to manage the disease and stress. The noise from the offloading, jack hammering, and overall banging often disrupted her peace. The noise would keep her up all day, even if she had not gotten any sleep the night before, and ruined her sleep schedule. Further, the noise exacerbated her migraines. Ms. Zlatkiss also testified that there were always vibrations from the construction. Construction equipment would sometimes block her parking spot, and she often experienced difficulty backing out of the spot because her visibility would be blocked by the construction. She could not use her balcony because of the noise. Ultimately, Ms. Zlatkiss testified that she would have never purchased the unit if she had known all of the problems that would arise from the SELA construction.

10. Plaintiff: Leon Greenblatt III

Plaintiff, Leon Greenblatt III, was unable to testify in person at trial because of his deteriorating health. Counsel submitted Mr. Greenblatt's deposition transcript from July 18, 2018 in lieu of his live testimony. *See* Greenblatt, Ex. P28. During his deposition, Mr. Greenblatt

testified that he had purchased 2601-03 Napoleon Avenue and 2605 Napoleon Avenue in 1979. 2605 Napoleon Avenue consists of a separate upstairs and downstairs portion.[13] During Hurricane Katrina, the property received about ten feet of water. He had a total of four tenants who resided at the property—Ms. Barbra Page, Ms. Courtney Page, Mr. Earl Youngblood, and Ms. Lisa Youngblood. Mr. Greenblatt charged Ms. Courtney Page and the Youngbloods $700 a month in rent; Ms. Barbra Page was not charged rent during her tenancy. Mr. Greenblatt would visit the property weekly, but he only walked the perimeter of the property. He never went inside the residence. In 2017, Mr. Greenblatt sold 2605 Napoleon Avenue to Julie's Property, LLC for $290,000.

Mr. Greenblatt leased the dry-cleaners located at 2601 Napoleon Avenue to Mr. Nguyen and had residential tenants in 2603 Napoleon Avenue. He charged $2000 a month in rent to the dry-cleaners; however, while the SELA construction was on-going, he reduced the rent to $1000 a month. He testified that there was even a point in time when he did not charge Mr. Nguyen any rent because of the decline in business at the cleaners. Mr. Greenblatt also testified that he lost some tenants and was unable to rent units A and B in 2603 Napoleon Avenue. He would also visit these properties on a weekly basis.

Mr. Greenblatt testified that he first noticed the SELA construction sometime before 2013. As a result of the construction, cracks formed on the properties, and the front porch to 2605 Napoleon Avenue separated from the building. Mr. Greenblatt hired Michael Prado to perform repairs at his properties.

11. Lisa Youngblood

Ms. Lisa Youngblood is not a plaintiff in this case. She was one of Mr. Greenblatt's tenants and testified regarding the condition of 2605 Napoleon Avenue and her experience as a tenant. Ms. Youngblood testified that she paid $700 in rent per month while she lived at 2605 ½ Napoleon Avenue. The apartment was her primary residence during the SELA construction. During the SELA construction, she observed pile driving and excavation work. She saw workers digging up the neutral ground and laying out pipes. She did not notice construction when she woke up to leave for work in the mornings, but she saw the construction when she would return home in the afternoons. The construction would last until four or five in the evening. While the construction

[13] The downstairs portion has the address 2605 ½ Napoleon Avenue.

was on-going, Ms. Youngblood experienced issues with parking and accessing her residence. She could also feel vibrations from the construction work when she was home.

Ms. Youngblood testified that she had lived with her father in 2605 ½ in 2008, but she had not noticed problems with the apartment during that time. During the SELA construction, cracks began to form in the apartment. Sometime in 2014 or 2015, water also began to intrude into her apartment. In her deposition, Ms. Youngblood testified that the water intrusion was as a result of the upstairs front porch separating from the building. *See* Greenblatt, Ex. P29. Eventually, Ms. Youngblood had to move out of the apartment so the damage could be fixed. Ms. Youngblood testified that she had helped clean the upstairs portion of 2605 Napoleon after Ms. Barbra Page moved out of the apartment. While there, she saw that a hole had formed in the ceiling; however, she testified that she had not paid attention to the condition of the walls.

12. Indiana Franchesca Greenblatt

Mrs. Indiana Greenblatt, wife of Mr. Greenblatt, testified during trial on behalf of her husband. She affirmed much of what Mr. Greenblatt testified to in his deposition. Mr. Greenblatt purchased the properties in 1979 and rented them to various tenants. Eventually, Mr. Greenblatt sold 2605 Napoleon Avenue to Julie Properties, LLC for $290,000. She and her husband would visit the properties on a weekly basis, even when the SELA construction was on-going. During the construction, Mrs. Greenblatt testified that she could feel the vibrations from the heavy machinery, and there was often lots of traffic in the area. The front porch to 2605 Napoleon Avenue separated from the main building, and both properties experienced cracking throughout the building. She also testified that her husband reduced the rent for the dry cleaners during the thirty-six months the construction was on-going, and for twelve of those months, Mr. Greenblatt did not charge the dry-cleaners rent at all.

13. Melvin Spooner:

Melvin Spooner did not provide live testimony at trial, but his deposition was submitted into evidence. *See* Sewell, Ex. P58. Mr. Spooner is the Chief Engineer for SWB. He testified that SWB and USACE worked in conjunction on the SELA project. SWB was mostly involved during the design phase of the project. SWB hired independent consultants to come up with the design for the project and then would ultimately approve these designs. USACE was in charge of overseeing the actual construction of the project and hiring contractors to perform the construction.

The Giken method and timber pile driving were used during the Napoleon II phase of the SELA project. Mr. Spooner admitted that there was a potential for damage from the SELA construction activities. SWB created a hotline for residents to call in regarding issues they experienced with the construction, and public meetings were held with the residents in the affected neighborhoods. Further, he admitted that vibrations, noise, and dust were associated with the SELA construction.

14. John Fogarty

Mr. Fogarty works as a civil and residential engineer for the United States Army Corp of Engineers ("USACE") and was the administrative contracting officer for the SELA construction. Mr. Forgarty testified that while the SELA project was a joint effort between the USACE and SWB, the USACE handled the majority of the project. SWB designed the project and then handed it over to the USACE to implement the project. After the project was handed over to the USACE, SWB's involvement was limited to utility inspections and maintenance of the utilities. SWB was not responsible for overseeing the construction or the contractors. SWB was not a party to the contract between the USACE and Boh Bros, nor did SWB had the authority to order Boh Bros to stop working on the projection—only the USACE had that authority.

15. Mubashir Maqbool

Mubashir Maqbool did not testify at trial, but his deposition testimony was submitted into evidence. *See* SWB, Ex. D16. Mr. Maqbool is an engineer with SWB, and his department primarily worked with the designs and specifications for the SELA project. He would respond to Request for Information ("RFI") submitted by USACE to SWB and worked to resolve the issues presented in the RFI. He would also attend monthly meetings regarding the progress of the SELA project.

Mr. Maqbool testified that the SELA project was a collaborative effort between SWB, USACE, the designers, and the contractors. One of the goals of the project was for the construction to be conducted in a manner that had the least amount of effect on the environment and was the least disruptive to the residents and businesses of the area. He also admitted that SWB knew that the quality of life for nearby residents would be disrupted because of limited access to their properties and traffic conditions.

16. Brad Reidenauer

Brad Reidenauer did not testify during trial, but his deposition testimony was submitted into evidence. *See* SWB, Ex. D17. Mr. Reidenauer worked as the Field Project Manager for Boh

Bros. for a portion of the work performed during the Napoleon II phase. As the project manager, Mr. Reidenauer oversaw the work performed by Boh Bros., reviewed reports, and attended SELA project meetings. The work performed during this phase included timber pile driving, sheet pile driving, excavation, and backfilling. Overall, Mr. Reidenauer testified that Boh Bros. was in compliance with the plans and specifications for Napoleon II.

C. Expert Testimony—General Findings on Causation

1. Greenblatt Expert: Michael Prado

Michael Prado is a contractor who was hired by Mr. Greenblatt to perform repairs at his properties. Mr. Prado testified that he saw gaps and cracks everywhere at Mr. Greenblatt's properties. He described the cracks as extensive and "just not normal." While he was performing repairs, he observed heavy equipment, such as pile driving equipment, near the properties. He believes the damages were caused by the SELA construction activity.

Mr. Prado worked on the properties between 2015-2016. The majority of the work he performed at the properties were repairs and touch ups to cracks in the sheetrock. While there, he also noticed that the floors in 2605 Napoleon Avenue were buckling. Although he saw evidence of fixed leaks, he did not see much evidence of roof damage in the apartment. Mr. Prado also testified that he had to backtrack and repair cracks that had reappeared as a result of the construction vibrations over the course of time he was there,

2. Greenblatt Expert: Beau Williams

Beau Williams was hired by Mr. Greenblatt to perform sanding and refinishing to the floors at 2605 Napoleon Avenue. He is self-employed and has owned his own flooring business for twenty-seven years. He testified that the contractor for the repairs had called him to come perform the work. He also testified that he did not see any evidence of cracks in the unit prior to starting his work. His estimate for the additional repairs needed for Mr. Greenblatt's property was submitted into evidence. *See* Greenblatt, Ex. P7-P9.

3. Sewell Plaintiffs' Expert: Michael Gurtler

Michael Gurtler ("M. Gurtler") of Gurtler Bros. is a licensed general contractor. He testified during the first phase of the SELA trial before this Court.[14] He and his brother, Frederick Gurtler, operate Gurtler Bros. Consulting, Inc. ("Gurtler Bros."), a licensed Louisiana engineering company. M. Gurtler has inspected about 220 properties for this case. Gurtler Bros. performs about

[14] *See* Reasons for Judgment: Residential Trial Group A.

a thousand inspections each year and has probably performed around twenty thousand inspections since its incorporation. M. Gurtler performed inspections of all the Sewell Plaintiffs' properties. M. Gurtler testified that he observed damage in all the homes he inspected. A general observation he has made is that the damages in the properties decrease the further away he traveled from the location of the SELA construction site. Most damages stop about a block from the construction site.

M. Gurtler testified that the properties he observed experienced similar damages. Most of the damages were in rooms closest to the construction site. He also saw porches that had separated from main structure of the homes. The kind of cracking and degree of the damages are not the kind he has seen from typical differential settlement cracking. While every property uptown will settle to some degree, the majority of the settlement will occur within the first year of the property and cease after five years. All of the properties he observed had been in good condition prior to the SELA construction and now have widespread damage. His opinion is that the direct vibrations from the pile driving and construction equipment caused the damages to the properties.

4. Sewell Plaintiffs' Expert: Wade Ragas

The Sewell Plaintiffs tendered Wade Ragas as an expert in real estate development. Mr. Ragas prepared a chart that calculated the temporary diminishment in rent each property suffered. *See* Sewell, Ex. P54. Mr. Ragas testified that the rent for each property would vary depending on its location and square footage. He looked at similar places in the area near the plaintiffs' properties to determine their market rent. He then deducted costs for loss of parking, dust and vibrations, noise, and the extent of repairs to be made at each property. All of this added up to the total impact experienced by each plaintiff at his or her property, which then valued the total amount of rent lost by each homeowner. Mr. Ragas looked at the construction contracts, the activities in each area, the Gurtler Bros. report, and the testimony of each Plaintiff to create his chart. Mr. Ragas also estimated the amount of rent each plaintiff would lose while displaced from their homes for repairs. *See* Sewell, Ex. P55.

5. Sewell Plaintiffs' Expert: Frederick Gurtler

Frederick Gurtler ("F. Gurtler") is a licensed civil engineer and a licensed home inspector specializing in residential properties. He also testified during the first phase of the SELA trial before this Court.[15] F. Gurtler has inspected thousands of properties during this SELA litigation,

[15] *See* Reasons for Judgment: Residential Trial Group A.

including the ten properties at issue in this current case. He also co-wrote the report with his brother, M. Gurtler, used by the Sewell Plaintiffs.

F. Gurtler opined that the damages he observed resulted from ground vibrations caused by the SELA excavation and the moving of construction equipment. From the documents he read, he opined that the vibration monitoring during the construction was not done consistently, and no measures were taken to reduce the vibrations that exceeded .25 PPV. He observed widespread cracking, separation of front porch steps, and separation of the trim throughout the properties. He testified that any pre-existing damages would have been worsened by the construction. Generally, the properties located further away from the construction site experienced different and less severe damages than those closer to the SELA construction.

6. Sewell Plaintiffs' Expert: Dr. Rune Storesund

Dr. Rune Storesund is a licensed civil engineer in multiple states including Louisiana. He is an expert in geotechnical engineering and provides services regarding construction impact. He testified during the first phase of the SELA trial before this Court.[16] His role in the SELA litigation is to review and digest SELA documents, provide needed geotechnical input, and evaluate the possibility of the types of damages that could arise from the SELA construction.

Dr. Storesund testified that the vibration monitoring data gathered during the construction was incomplete and unreliable. There were many instances when the construction activities were not monitored at all, or if they were being monitored, the monitoring equipment was not at a location closest to the construction site. However, the vibration monitoring charts did show exceedances of the .25 PPV threshold.

Although he is not an expert on noise, Dr. Storesund testified that he deals with noise a lot in his line of work. The same equipment that was used to monitor vibrations also had the capability to monitor noise levels. However, Dr. Storesund testified that he only found one instance where anyone had monitored the noise. This was when Boh Bros questioned why SWB was not monitoring the noise levels. His understanding from reading the contracts provided is that the SWB was supposed to be in charge of monitoring the noise levels at the construction site. During the Napoleon Phase of the SELA construction, workers would pre-drill holes in the ground, which created sedimentation ponds and would require pumps to extract the water. This caused even more noise than that experienced at other phases of the construction. The limit for noise levels was

[16] *See* Reasons for Judgment: Residential Trial Group A.

supposed to be eighty-five decibels at the construction easement; yet the one instance where the noise was monitored, the noise level had been recorded at eighty-eight decibels.

7. Defendant's Expert: Dr. David W. Sykora

Dr. David Sykora is a licensed professional engineer in Louisiana. He works for Exponent, an engineering and scientific consulting firm that specializes in analyzing accidents and failures. He testified during the first phase of the SELA trial before this Court.[17] He is an expert in geotechnical engineering. Dr. Sykora physically inspected the properties owned by the Sewell Plaintiffs in this case. He analyzed ground conditions at the properties and determined that each property will have progressive and long-term differential settlement over its lifetime. The settlement would not stop after five years. He also reviewed all the documents and allegations submitted by the plaintiffs. To reach his final conclusion, he assessed each building's age, the type of construction taking place nearby, the soil at the property, and the existing documents regarding each property before and after the construction occurred. Dr. Sykora's overall opinions regarding the SELA construction is that (1) the vibration monitoring was sufficient, (2) most of the cosmetic damage can be attributed to the soil settlement, (3) settlement would have occurred without the SELA construction, and (4) the SELA construction did not cause damage to these properties.

8. Defendant's Expert: Dr. James Bob Bailey

Dr. James Bob Bailey is a licensed professional engineer who works for Exponent. He is an expert in structural engineering, and he also testified during the first phase of the SELA trial before this Court.[18] He testified that he has seen structures that were subject to vibration damages in his past experience. Dr. Bailey observed the exterior and interior of each property and looked for the causes of stress on the building.

As part of this litigation, he performed a differential diagnosis analysis to see what could be potential causes of damage on the properties, including construction vibrations. He relied on a number of sources, including publicly available data, the plaintiffs' expert reports, and his own personal observations. Before reaching his opinion, he would assess the building's age, construction type, and layout. He would also compare pre- and post- construction conditions of the properties and assess other potential sources of damage. Overall, Dr. Bailey's opinion is that the SELA construction activities did not cause structural, foundational, or cosmetic damages to the

[17] *See* Reasons for Judgment: Residential Trial Group A.
[18] *See* Reasons for Judgment: Residential Trial Group A.

properties at suit. The cosmetic damage he observed is due either to the differential settlement over time or some other form of distress. The cosmetic damage does not affect the structural integrity of the properties.

II. CAUSATION AND CAUSES OF ACTION

A. SELA Project Caused Damage to Plaintiffs' Properties or Exacerbated Pre-Existing Damages

It is impossible for this Court to perform a crack-by-crack analysis in order to determine precisely which cracks existed prior to or formed after the SELA construction. In some instances, pre-construction photos offered better evidence of pre-existing conditions than others. In most instances, however, there were either no pre-construction photographs or there was a delay between the start of the project and the date when pre-construction photographs were taken.

SWB anticipated that damages would occur. SWB was aware of the USACE's Programmatic Agreement, which identified the potential ZOI. Moreover, SWB was familiar with the SELA brochure that was provided to homeowners, which clearly spelled out that vibrations may cause damage. SWB hired a forensic contractor for purposes of claims resolution. SWB provided a hotline for anticipated complaints from homeowners, and SWB maintained a capital program with its legal department for purposes of handling damage claims. Sewell, Ex. P58, p. 190.

The evidence shows that once construction began, all of the subject properties experienced vibrations from the operation of heavy construction equipment. This activity included timber pile driving, excavation, sheet pile insertion, soil testing, and backfill paving, among other activities. These acts required the use of backhoes, jackhammers, cranes, constant loading and movement of dump trucks, and the installation of a large cement box culvert. All of this noise, dust, dirt, and blocked traffic access created a constant nuisance for all of the homeowners.

The Court finds the fact witnesses credible. All fact witnesses had first-hand knowledge of the condition of their homes before and after construction. They experienced the disturbances first-hand by electing to remain in their homes during the construction. All plaintiffs complained that they could feel their homes shake due to vibrations emitted from the construction activities, even properties that were not located directly in front of the construction site. Though the extent of damage varied from house-to-house, the evidence shows a consistency and commonality of damage shared by all the houses along the SELA Project route. All houses showed cracks in the molding, separations between walls and ceilings, and those properties with chimneys and porches

exhibited gaps. Gurtler Bros. noted the widespread cracking throughout the homes. Moreover, they pointed out that the commonality of damages was distinct from the thousands of houses they had inspected in areas away from the SELA Project.

Just as it is impossible for this Court to perform a crack-by-crack analysis, it is impossible for the Court to perform a vibration-by-vibration analysis. The vibration monitoring evidence presented by plaintiffs did not tie a specific activity or spike to a specific damage. SWB emphasized this point. SWB experts also emphasized that the .25 PPV limit established by the USACE is a conservative limit. Dr. Sykora testified that .5 PPV is typically accepted as the lowest value for potential damage to occur. He also testified that only spikes *above* the .25 PPV were reported to the USACE; spikes at the .25 PPV limit were not reported. On cross-examination, plaintiffs demonstrated that the vibration monitors were often placed at different locations depending on where the contractor expected the vibrations to have the most impact. Therefore, there were often other areas where vibration monitoring did not take place but still could have experienced spikes above the .25 PPV threshold.

It would be disingenuous to simply conclude, as SWB's experts did, that the SELA Project did not cause any exacerbation or damage to the plaintiffs' properties. While impossible for the Court to determine which of the many complained of damages can be attributed to the SELA construction, the Court finds that the commonality of the damages indicates that these properties were adversely affected by the construction activities. However, the Court is skeptical of the necessity of all the repairs proposed by the Gurtler Bros. reports. In their reports, for instance, the Gurtlers include work to be done in every room of the properties, including the closets. In another instance, M. Gurtler testified that after patching a crack in one area of a property, he would paint all the walls of the property that are the same and continuous color of the repaired area so that there would not be "differences in the paint." The Court finds this to be unreasonable. On cross-examination, SWB demonstrated that the term "RR" in the Gurtler Bros. report means "Replace and Repair", and only rooms that had RR included in its cost estimate would have actual repairs made. For some of the properties, the Gurtler Bros. reports included estimates for landscaping or paving over driveways with no explanation as to how these improvements are related to the SELA construction. Some plaintiffs even testified that they did not know why the Gurtlers included certain repairs in their estimate.

The job of the Court is to place the plaintiffs in the same position they were in prior to the SELA construction, not in a better position. Therefore, the Court does not give credence to items it deems to be improvements. Further, the Gurtler Bros. included estimates for the cost of moving expenses so that the plaintiffs could temporarily relocate while repairs are being performed. Although the performance of the repairs may be inconvenient, the Court finds relocation costs to be unnecessary as the repairs will not require the plaintiffs to vacate their homes.

B. Plaintiffs' Cause of Action

1. Control and Ownership of the SELA Project

SWB has consistently argued that it is not the owner of the SELA Project. The USACE, SWB argues, is the administrator of the SELA projects and assumes full and complete control of the SELA Project in this case. SWB claims it did not perform any construction activities and did not select the contractors, subcontractors, or equipment for the work. Thus, SWB maintains it did not have the care, custody or control of the SELA Project.

SWB made identical arguments in the *Holzenthal* case. There, the Fourth Circuit addressed SWB's position: "underlying all of SWB's arguments with respect to liability is its repeated assertion . . . that the [SELA Project] is not SWB's project because the construction was directly supervised by entities other than SWB. It asserts it was merely a 'local sponsor' of the project and that it contracted away to third parties any responsibility it otherwise would have had for damages." *Holzenthal v. Sewerage & Water Bd. of New Orleans*, 2006-0796 p. 6 (La. App. 4 Cir. 1/10/07), 950 So. 2d 55, 61. The *Holzenthal* Court agreed with the trial court's ruling and rejected SWB's argument, finding SWB could not and did not contract away the duties it owed the plaintiffs. *Id.*

In so finding, the appellate court reviewed the Project Cooperation Agreement between USACE and SWB noting that: (1) the project was connected to SWB's infrastructure and existed as SWB's property on SWB servitudes and easements; (2) SWB had the final right of approval over the contractors' activities; (3) the creation of a project coordination team with representatives from the government and SWB to oversee the project; (4) SWB's requirement to contribute 25% to 50% of the total project costs; (5) consultation with SWB to determine lands, easements, and rights of way for the project; and (6) SWB was required to hold and save USACE free from project damages. *Id.* at 67-68.

All of these same facts exist in the present matter. The SELA Project and the large drainage systems are owned and maintained by SWB. Sewell, Ex. P58, p. 22. SWB was in charge of the

engineering and design of the project. *Id.* at 51. SWB was always involved with the design consultants. *Id.* at 61. SWB owns the lands, rights of way, and easements, and SWB provides USACE access to them. *Id.* at 88. The Project Coordination Team consisted of SWB and USACE representatives. *Id.* at 78-79. Pursuant to the PPA and CEA, SWB must cover 35% of the cost of the SELA Project. Sewell, Exs. P2 & P3. Also, pursuant to those same agreements, SWB must hold harmless and indemnify USACE from damages related to the design, construction, and maintenance of the project. *Id.*

Accordingly, if there were any doubt, this Court finds that SWB is the owner and controller of the SELA Project and SWB should be considered as such under plaintiffs' theories of recovery.

2. Inverse Condemnation

Louisiana Constitution Article I, Section 4, provides, "Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into the court for his benefit." La. Const., Art. I, Section 4. The Constitution requires compensation even in those cases in which the State has not initiated expropriation proceedings in accordance with the statutory scheme set up for that purpose. *Holzenthal*, 950 So. 2d 55, 62 citing *State, Through Dept. of Trans. and Dev. v. Chambers Investment Company, Inc.*, 592 So. 2d 598, 602 (La. 1992). As the Louisiana Supreme Court noted in *Chambers*, it is now hornbook law that any substantial interference with the free use and enjoyment of property may constitute a taking of property within the meaning of federal and state constitutions. *Id.* at 62-63. The action for inverse condemnation provides a procedural remedy to a property owner seeking compensation for land already taken or damaged against a governmental or private entity having the powers of eminent domain where no expropriation has commenced. *Chambers*, 592 So. 2d 598, 602 citing *Reymond v. State, Dept. of Highways*, 255 La. 425, 231 So. 2d 375, 383 (1970). The action for inverse condemnation is available in all cases where there has been a taking or damaging of property and where just compensation has not been paid, without regard to whether the property is corporeal or incorporeal. *Id.* [Citations omitted].

The Louisiana Supreme Court developed a three-part test to determine whether a claimant is entitled to eminent domain compensation: (1) whether a person's legal right with respect to a thing or object has been affected; (2) if a property right is involved, whether the property has been taken or damaged in a constitutional sense; and (3) whether the taking or damage is for a public purpose. *See Holzenthal*, 950 So. 2d at 63.

In *Holzenthal*, the trial court applied this test and found SWB liable for inverse condemnation. *Id.* The *Holzenthal* court declared, "[t]his is clearly a case in which a valid and vital public purpose, improved drainage of our city-below-sea-level was served . . . [d]espite the best efforts of the SWB and [Army Corps of Engineers] and the contractors, dewatering and vibration damage to these neighboring interests was the natural consequence of the Project." *Id.* at 85. For reasons similar to those articulated in *Holzenthal*, applying the *Chambers* test, this Court finds that the plaintiffs suffered an inverse condemnation of their property. First, plaintiffs have a legal right in their properties, and their testimony, as well as the expert testimony, show that their properties were damaged and that their property rights were adversely affected. Second, plaintiffs' damages were an integral consequence of the SELA Project, which was specifically carried out to improve the drainage system and to reduce flood-related damage in the New Orleans area. Last, as to public purpose, the Court finds that providing drainage improvement to neighborhoods of New Orleans that are susceptible to flooding and flood-related damage certainly serves a public purpose. As such, the Court finds that plaintiffs are entitled to damages under the theory of inverse condemnation.

3. Strict Liability for Ultrahazardous Pile Driving Under Article 667

Pursuant to Louisiana Civil Code article 667, "the proprietor is answerable for damages without regard to his knowledge or his exercise of reasonable care, if the damage is caused by an ultrahazardous activity. An ultrahazardous activity as used in this Article is strictly limited to pile driving or blasting with explosives."

In *Vicknair v. Boh Bros. Construction Co.*, the Fifth Circuit found that installation of steel sheeting with a vibratory hammer, and driving wood sheeting with a backhoe (for an emergency sewer repair) was not ultrahazardous. 2003-1351 (La. App. 5th Cir. 3/30/04), 871 So. 2d 514. The Louisiana Supreme Court, in *Suire v. Lafayette City-Parish Consol. Gov't.*, cited *Vicknair* approvingly and found that the driving of metal sheets with backhoes did not constitute pile driving under article 667. 2004-1459 (La. 4/12/05), 907 So. 2d 37. In *Holzenthal*, the Fourth Circuit distinguished *Suire* and found that the driving of metal sheets into the ground with a vibratory pile-driving hammer, as opposed to a backhoe, constituted "pile driving". 950 So. 2d at 55. The court noted that seventy-ton cranes were used with the vibratory hammer and relied on vibration monitoring evidence showing that the highest levels of vibrations would have been caused by crane movement regardless of the type of pile driving. *Id.*

The legislature did not intend for the use of "cranes" alone to constitute an ultrahazardous activity. The Louisiana Supreme Court in *Suire* explained that, "[i]n light of the 1996 amendment, Louisiana courts are relieved of the responsibility to decide whether a certain activity is ultrahazardous for purposes of deciding whether the absolute liability standard applies. *Suire*, 907 So. 2d at 48-49, citing *Mossy Motors, Inc. v. Sewerage and Water Bd. of City of New Orleans*, 1998–0495 (La. App. 4th Cir. 5/12/99), 753 So. 2d 269 (discussing the 1996 amendment and noting that "[t]he new definition by amendment defines an ultrahazardous activity legislatively"). "Any other activities besides the two the article specifically lists are not ultrahazardous for purposes of article 667. Thus, to qualify for the absolute liability standard, the plaintiff must show that the activity complained of is either 'pile driving' or 'blasting with explosives.'" *Suire*, 907 So. 2d at 49. Following the Louisiana Supreme Court's analysis in *Suire*, this Court does not find that the installation of metal sheet piles into the ground with a Giken constitutes the ultrahazardous activity of pile driving. Thus, SWB is not strictly liable for ultrahazardous activity.

4. Strict Liability and Negligence Under La. C.C. arts. 2315, 2317, and 2317.1

Plaintiffs' strict liability and negligence claims arise pursuant to Louisiana Civil Code articles 2315, 2317, and 2317.1. Article 2317 reads, "[w]e are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications." La. C.C. art. 2317. Those modifications are contained in Article 2317.1:

> The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case.

La. C.C. art. 2317.1.

As a threshold matter, to prevail under articles 2317 and 2317.1, a plaintiff must establish custody or garde. The owner of a thing is the presumed guardian of its structure. *Doughty v. Insured Lloyds Ins. Co.*, 576 So. 2d 461, 464 (La. 1991). The test for determining custody or garde is two-fold: (1) whether the entity has control or authority over the thing; and (2) whether the person receives a substantial benefit. *Id.* Here, SWB has control and authority over the SELA Project because SWB is responsible for the public drainage system for the city of New Orleans and it contracted with the USACE to engineer and execute the project. Moreover, SWB had access

to the work sites and actively participated in project oversight and plan modification when necessary. SWB derives a benefit because the SELA Project's purpose is to improve the public drainage system, for which SWB is responsible.

With custody and garde established, a plaintiff must also prove: (1) the project presented an unreasonable risk of harm; (2) the owner could have prevented the harm had it exercised reasonable care; and (3) the owner's failure to exercise such care caused the plaintiff's damages. La. C.C. arts. 2317 and 2317.1

First, SWB was well aware that the project presented a risk of harm to plaintiffs' properties pursuant to the terms of the PA and its understanding from USACE that properties could experience vibration related damages, especially those properties located within the ZOI and APE. Second, SWB designed the project with the help of consultants. SWB's project plans anticipated that damage could be caused from vibrations. Still, the damages were foreseeable, and the plans were carried out anyway. Site-specific monitoring data (survey points, piezometers, inclinometers, ground vibrations, and noise) was collected during construction. SWB hired a forensic contractor who was required to collect photo documentation of all existing structures prior to initiation of construction for purposes of claim resolution. Third, a hotline was established to address concerns and complaints during construction work. Even after receiving reports of damages on its hotline, and receiving vibration data showing exceedances over .25 PPV, there was no evidence that SWB took further measures to prevent property damage. Lastly, the evidence presented during trial demonstrated that the construction activities, which lasted several years, caused physical damage to plaintiffs' properties in the forms of cracks and separations, and also caused disturbances that interfered with plaintiffs' use and enjoyment of their homes. For these reasons, the Court finds that plaintiffs presented sufficient evidence to hold SWB liable under Louisiana Civil Code articles 2315, 2317 and 2317.1.

As this Court understands, the essential difference between strict liability and negligence theories is knowledge of a defect. *See Pool v. City of Shreveport*, 607 So. 2d 861, 863-64 (La. App. 2nd Cir. 1992). Knowledge of a defect gives rise to a corresponding duty to act. *See Soccorro v. City of New Orleans*, 579 So. 2d 931 (La. 1991). Under article 2317, knowledge of the defect is unnecessary. *Id.*; *see also Loescher v. Parr*, 324 So. 2d 441, 446 (La. 1976). Given that this Court found SWB strictly liable under articles 2317 and 2317.1, the Court does not find that a negligence analysis is necessary.

III. CONCLUSIONS AND DAMAGES

A. Quantum

The Court does not find it necessary for the plaintiffs to temporarily relocate while repairs are being made and therefore will not award moving expenses or furnished rent. Further, the Court will not give credit to items it finds to be unnecessary or unrelated to the SELA construction. The Court finds the following:

1. Julia Kingham and Rick Boehm—4414 Baronne Street

Facts

4414 Baronne Street was built in 1925. Julia Kingham and Rick Boehm purchased the property in 2000. The home flooded during Hurricane Katrina, receiving twelve to fourteen inches of water inside the house. As a result, the basement had to be gutted and new flooring was poured over the existing concrete slab.

Julia Kingham testified that her home was in excellent condition prior to the SELA construction. There were hairline cracks in her driveway prior to the construction that became wider after the construction started. Although Ms. Kingham testified that the topping slab in her basement did not have any cracks prior to SELA, SWB brought out on cross-examination that she had testified in an earlier deposition that hairline cracks began appearing on the slab as early as 2007. The Gurtler Bros. included an estimate for repairing the pool, despite M. Gurtler testifying that none of his associates had inspected the pool. Ms. Kingham testified that the pool has stopped leaking, and the water had just been evaporating faster than normal.

Ms. Kingham testified that she could hear the construction activities, such as jackhammering, pile driving, and the movement of the construction trucks down the street while the construction was on-going. She could feel the vibrations from the construction site and felt the house shaking, which sometimes made it difficult to read her computer while working. Further, while construction was taking place, there was no parking available on Baronne Street. This meant that Ms. Kingham could not park in front of her house, and this became an issue whenever her driveway was blocked by construction vehicles. As a result of the noise and lack of parking, Ms. Kingham was no longer able to entertain guests at her residence.

The construction did not take place directly in front of 4414 Baronne Street but rather one block away. Dr. David Sykora testified that the nearest timber pile driving took place 180 feet away from the house, and the nearest sheet pile installation 165 feet away from the property. Dr.

Sykora opined that the residence was outside of the calculated zone of influence, construction impact zone, and the area of potential effect. The strongest vibrations recorded at the property fell well below the .25 PPV established by USACE. However, Dr. Sykora also admitted on cross-examination that his findings could be invalidated wholly or in part because of changes that were outside of his control. For instance, there was no vibration monitoring on Baronne Street during the SELA construction because the street was not directly located on the construction route.

Dr. James Bob Bailey testified that after Hurricane Katrina, Ms. Kingham and Mr. Boehm poured an existing topping slab on top of the already existing slab. This added extra weight will cause the ground to settle more and consequently cracks will appear in the residence. This floating slab, according to Dr. Sykora, sits on the soil and is not tied to the foundation of the residence; thus, this slab does not provide structure to the main floor of the home.

Damages

Gurtler Bros. estimates it will take a total of $254,523.06 to repair the damages at 4414 Baronne Street. The Court finds this amount to be excessive. Gurtler Bros included repair estimates for the foundation of the residence, replacement of the driveway, repairing of the pool, replacement of bathroom tiles, and repairing/repainting every room inside the house. However, Ms. Kingham testified that the pool was not damaged, and cracks were noted in the topping slab in the basement as early as 2007.

Property Damage

Gurtler Bros. Estimate:	$281,084.56
Repairs/ Expenses Unrelated to SELA:	($215,142.14)
Contents/Other Structures:	($26,561.50)
Total:	**$39,380.92**

Ms. Kingham testified that she first became aware of the SELA construction sometime in 2013 and the construction lasted about three years. Parking became unavailable in front of her home, and there were times when her driveway would be blocked by construction vehicles. Construction took place for four to six hours a day, during which she could hear noise and feel vibrations from the construction activities. Dr. Wade Ragas calculated that Ms. Kingham's residence lost about $0.44 per square footage for quiet use and enjoyment over a total of 40 months.

Loss of Use and Loss of Enjoyment

Total (40 months):	**$48, 875.20**

Total Damages for 4414 Baronne Street:

Property:	$39,380.92
Loss of Use and Enjoyment:	$48,875.20
Total:	**$88,256.12**

2. Beryl Mundee—4321 S. Liberty Street

Facts

4321 S. Liberty Street was built in 1894. It was originally built as a shotgun double but was converted into a single-family dwelling in 1961. Mrs. Beryl Mundee and her husband purchased the property in 1974. The residence has undergone two major renovations since Mrs. Mundee purchased the property. Mrs. Mundee testified that the property received eighteen to twenty inches of water during Hurricane Katrina which required extensive foundation work to be done. The residence needed to be renovated again after Chinese drywall was discovered in the home—these renovations were completed in June of 2012.

Mrs. Mundee testified that street excavation for the SELA construction began in July 2012. Construction near the property ended sometime in January 2016. *See* Sewell, Ex. D26, p. 20. Trucks and bulldozers would block S. Liberty Street, and there were times when Mrs. Mundee was unable to access her street. As a retiree, Mrs. Mundee was often home while construction was taking place. She testified that she could feel incredible vibrations, but these vibrations occurred intermittently. While she was able to carry on with her daily life, the construction made everything stressful.

Dr. David Sykora testified that the closest sheet piles to the Mundee residence were 185 feet away from the home, and the nearest timber piles were 190 feet away. The Mundee residence did not fall within the zone of influence, construction impact zone, or the area of potential effect defined by USACE. Furthermore, Dr. Sykora opined that the maximum vibrations calculated to have occurred at the property were still below the .25 PPV limit set by USACE. *See also* Sewell, Ex. D16, p. 48.

Damages

Gurtler Bros. estimates that it will take $113,328.20 to repair the damages at 4321 S. Liberty Street. The Court finds this amount to be excessive. The Gurtler Bros. estimate includes repairs to the elevations of the home, repairs for landscaping, repairs to the roof, and repairing/repainting every room and closet in the home.

Property Damage

Gurtler Bros. Estimate:	$113,328.20
Repairs/Expenses Unrelated to SELA:	($48,139.57)
Contents/Other Structures:	($25,235.87)
Total:	**$39,952.76**

Mrs. Mundee testified that she noticed excavation for the SELA project in July 2012. Defense's expert report indicated that the construction was complete by January 2016. *See* Sewell, Ex. D16, p. 20. Dr. Wade Ragas calculated that Mrs. Mundee suffered a loss of $0.55 per foot for 41 months. *See* Sewell, Ex. P54. However, this estimate included a loss for parking even though Mrs. Mundee had an off street parking spot. *See id.* Factoring this in, Mrs. Mundee actually suffered a loss of $0.44 per foot.

Loss of Use and Loss of Enjoyment

Total (41 months):	**$34,069.36**

Total Damages for 4321 S. Liberty Street

Property:	$39,952.76
Loss of Use and Enjoyment:	$34,069.36
Total:	**$74,022.12**

3. The Guptas—2212 Napoleon Avenue

Facts

2212 Napoleon Avenue was built in 1920. Remedial foundation work and partial re-leveling was done between 1999 and 2002. Sewell, Ex. P52, p. 2; Sewell, Ex. D19, p. 3. The Gupta family acquired the home in November 2011. In 2012, the home underwent extensive renovations. Mrs. Gupta testified that construction began sometime in 2012 and ended in 2016. In 2014, the Guptas renovated the house, and then in 2017, made repairs to their daughter's room on the third floor.

Mrs. Gupta made numerous calls to SWB's hotline regarding vibrations and the formation of cracks in the house. Sewell, Ex. P33-P37. She testified that she works from home, and the on-going construction was disruptive. She further testified that it was difficult to access her property and entertain guests because of the construction. In an effort to subdue the noise from the construction, the Guptas installed SoundTite Panels on the windows facing Napoleon Avenue in August 2016. Sewell, Ex. P40.

Damages

Gurtler Bros. estimates it will take $186,403.29 to repair the damages at 2212 Napoleon Avenue. The Court finds this amount to be excessive. Gurtler Bros. included in its estimate repairs to the foundation and elevation of the front porch, moving expenses, and repairing/repainting every room of the house. The Guptas have already made some repairs to their house; however, they have not provided records or supporting documentation for these repairs. The only expense related to the SELA construction provided to the Court by the Guptas was a receipt for the installation of the SoundTite Panels.

Property Damage	
Gurtler Bros. Estimate:	$186,403.29
Repairs/Expenses Unrelated to SELA	($126, 769.97)
Contents/Other Structures	($25, 525.82)
Installation of SoundTite Panels:	$2,540.00
Total:	**$36,647.50**

Dr. Wade Ragas calculated that the Guptas suffered a loss of $0.55 per foot for 38 months. *See* Sewell, Ex. P54. Dr. Ragas also included an extra 10% total impact because the Guptas asserted that they heard noise from the construction after 6:00 PM. *Id.* However, all other testimony given in this trial indicates that the construction ended by 5:00 PM each day. Factoring this in, the Guptas actually suffered a loss of $0.39 per foot each month.

Loss of Use and Enjoyment	
Total (38 months):	**$73,507.20**

Total Damages for 2212 Napoleon Avenue	
Property:	$36,647.50
Loss of Use and Enjoyment	$73,507.50
Total:	**$110,155.00**

4. Jenelle Slobof and Neal Cohen—4437 S. Liberty Street

Facts

4437 S. Liberty Street was built in the 1870s and subsequently gutted and remodeled in 2014. Sewell, Ex. D26, p. 3. Jenelle Slobof and Neal Cohen purchased the residence in October 2014. Ms. Slobof testified that at the time of the purchase the house had just been renovated. At that time, the timber pile driving from the SELA construction was already complete. Dr. Sykora

testified that the construction activities between August 2014 and January 2016 involved removing the piles. The property is located about 300 feet away from the construction site. Sewell, Ex. D26, p. 3. Dr. Sykora opined that the residence did not fall within USACE's defined zone of influence, construction impact zone, or the area of potential effect.

Although SELA construction did not take place directly in front of the residence, Dr. Storesund testified that S. Liberty Street was used as an access street to the construction staging area. Ms. Slobof testified that accessing her property was difficult, and at times, she would have to park on a different street. Ms. Slobof worked from home during the construction, and her work was often interrupted because of the noise. Entertaining was difficult, and family members visiting from out of town would stay in a hotel rather than at the residence because of the construction and the disruption.

Damages

Gurtler Bros. estimates it will take $93,803.86 to repair the damages at 4437 S. Liberty Street. The Court finds this amount to be excessive. Gurtler Bros. included in its estimate repairs to the foundations of the porch, landscaping, replacing the driveway, moving expenses, and repairing/repainting every room of the house. Ms. Slobof testified that she has a gravel driveway and does not know why Gurtler Bros. would want to pave over it.

Property Damage	
Gurtler Bros. Estimate	$96,803.86
Repairs/Expenses Unrelated to SELA	($68,442.54)
Contents/Other Structures	($10,798.86)
Total	**$17,562.46**

Dr. Wade Ragas calculated that Ms. Slobof and Mr. Cohen suffered a loss of $0.24 per foot for seventeen months. Sewell, Ex. P54.

Loss of Use and Enjoyment	
Total (17 months)	**$6,874.80**

Total Damage for 4437 S. Liberty Street	
Property Damage	$17,562.46
Loss of Use and Enjoyment	$6,874.80
Total	**$24,437.26**

5. The Gaddys—2134 Napoleon Avenue

Facts

The Gaddys purchased 2134 Napoleon Avenue in September of 2013. The property was previously destroyed in a fire and had just been rebuilt when the Gaddys purchased the home. The home is located 200 feet away from the nearest construction site, Sewell, Ex. D18, p. 3, and Dr. Sykora testified that the property lies outside the zone of influence, construction impact zone, and area of potential effect established by USACE. Also, none of the vibrations which occurred at the residence exceeded the .25 PPV threshold.

Mrs. Gaddy testified that her family could feel vibrations from the construction and that dust would accumulate on the steps and front porch. The family also had difficulty accessing the property during construction. She testified that cracks formed and separation between the baseboards and the walls occurred. The front steps have separated from the front porch of the building; however, Dr. James Bob Bailey testified that the steps are not a part of the main foundation because they were poured separately from the main building. Mrs. Gaddy also testified that the family did not reside at the property every day. The family only spent about one weekend every month at the property; the majority of their time was spent at their main residence in Houston.

Damages

Gurtler Bros. estimates it will take $75,713.86 to repair the damages at 2134 Napoleon Avenue. The Court finds this amount to be excessive. The Gurtler Bros. estimate includes repairs to the foundation of the porch and repairing/repainting every room of the house.

Property Damage

Gurtler Bros. Estimate	$75,713.86
Repairs/Expenses Unrelated to SELA	($65,025.51)
Total	**$10,688.35**

Dr. Wade Ragas estimated that the Gaddys suffered $0.31 loss per foot for a period of thirty months for use and enjoyment of the property. Sewell, Ex. P54. However, Dr. Ragas admitted in court that he did not factor into his calculations that the Gaddys were not present at the property for the majority of the construction. Mrs. Gaddy testified that her family spent approximately one weekend each month at their home in New Orleans. The Court finds that the Gaddys did suffer a loss of quiet use and enjoyment during the time the family spent at the property but that they are

also not entitled to the full thirty months. Therefore, the Court reduces the award to one-fourth of the total amount under its calculations.

Loss of Use and Enjoyment	
Total (30 months; reduced to 25%)	**$3,215.48**
Total Damage for 2134 Napoleon Avenue	
Property Damage	$10,688.35
Loss of Use and Enjoyment	$3,215.48
Total	**$13,903.83**

6. 2501 Napoleon Condominium Association

Facts

Mr. Richard O'Neil testified that 2501 Napoleon Condominium Association ("Condo Association") was incorporated in 2009 after Hurricane Katrina. The members consist of each of the current condo owners. The Condo Association owns the exterior of 2501 Napoleon Avenue, which includes the property's foundation. Despite a 2009 and 2013 Gurtler Bros. report finding that the building's foundation required further investigation, the Condo Association has not done anything further to have the foundation inspected or repaired. Sewell, Ex. D9; D10.

Dr. David Sykora testified that 2501 Napoleon Avenue was eighty feet away from the SELA construction sheet piling. *See also* Sewell, Ex. D24, p. 3. Although the sidewalk around the property was cracked prior to the SELA construction, Mr. Richard O'Neil testified that the cracks became wider during the construction. The cement of the sidewalk also rose up, and the front gate can no longer open properly because of the raised sidewalk. Mr. O'Neil also testified that he uses the front steps on a daily basis and did not notice cracks or separations on the steps prior to the SELA construction. While the property was not in USACE's defined zone of influence or construction impact zone, it did fall within the area of potential effect. Sewell, Ex. D24, p. ix.

Damages

Gurtler Bros. estimates it will take $166,294.22 to repair the property owned by 2501 Napoleon Avenue Condominium Association. Sewell, Ex. P52. The Court finds this amount to be excessive. The estimate includes landscaping and repairs to the entire foundation of the building. *See id.* While the Court finds the SELA construction may have worsened the condition of the building, Gurtler Bros. noted serious pre-existing issues with the foundation prior to the construction. Sewell, Ex. D9; D10.

Property Damage

Gurtler Bros. Estimate	$166,294.22
Repairs/Expenses Unrelated to SELA	($141,164.85)
Total	**$25,129.37**

Dr. Wade Ragas found that the Condo Association suffered a loss of $0.19 per foot for a total of forty-two months for loss of use and enjoyment. Dr. Ragas admitted on cross-examination that he included this estimate because the members of the Condo Association would not have access to the storage units while repairs were taking place. However, because the Court finds it unnecessary for the members to move out of their homes while repairs are being made, they will still have access to the storage units. Further, Dr. Ragas allotted a separate award for loss of use and enjoyment to the individual members in his calculations. Thus, the Court finds that 2501 Napoleon Avenue Condominium Association is not entitled to an award for loss of use and enjoyment.

Total Damages for 2501 Napoleon Avenue Condominium Association

Total	**$25,129.37**

7. Richard O'Neil—2501 Napoleon Avenue, Unit A

Facts

Mr. O'Neil purchased his unit in March 2012. Prior to his purchase, there were minor issues in the unit, such as some cracking. The previous owner had repaired these issues to Mr. O'Neil's satisfaction by the time Mr. O'Neil moved into the condo. Mr. O'Neil testified that he could feel the vibrations from the construction and described the feeling similar to that of a train passing by the property. He could hear noise not only from the construction equipment but also from the vehicles using the road and from the workers going about their daily work. Prior to the construction, Mr. O'Neil had been able to park in front of his property. However, once construction began, he often had to park on S. Robertson Street in the parking lot reserved for nurses to use; he was only able to access this parking lot between the hours of 6 P.M until 7 A.M.

Damages

Gurtler Bros. estimates that it will take about $42,604.23 to repair that damages at 2501 Napoleon Avenue, Unit A. The Court finds this amount to be excessive. Gurtler Bros. included in its estimate repairs to the floors of the unit, repairing/repainting every room of the house, and moving expenses. Mr. O'Neil testified that he did not attribute the floor damage to the SELA

construction. Further, Mr. O'Neil testified that all the damages are focused towards the front of the unit, and his master bedroom and master bathroom did not suffer any damage. Mr. O'Neil also provided various receipts to the Court for repairs he claims are related to SELA construction damage. While the Court cannot determine whether all the receipts are related to SELA damage, it finds that the repairs to the gate, fence, and front door are SELA related.

Property Damage	
Gurtler Bros. Estimate	$42,604.23
Repairs/Expenses Unrelated to SELA	($31,253.99)
Repairs made by Mr. O'Neil	$1,461.40
Total	**$12,811.64**

Dr. Ragas estimated that Mr. O'Neil suffered a loss of $0.47 per foot for thirty-eight months. However, Dr. Ragas testified that he had mistakenly forgotten to factor in Mr. O'Neil's loss of parking. Therefore, the total impact Mr. O'Neil suffered was 30% instead of 25%, meaning that Mr. O'Neil actually suffered a loss of $0.56 per foot.

Loss of Use and Enjoyment	
Total (38 months)	**$24,195.36**

Total Damages for 2501 Napoleon Avenue, Unit A	
Property Damage	$12,811.64
Loss of Use and Enjoyment	$24,195.36
Total	**$37,007.00**

8. Anne Drown—2501 Napoleon Avenue, Unit B

Facts

Ms. Drown purchased her unit in September 2014 and used it as her primary residence until June 2017. She had the unit inspected prior to her purchase, and no defects were found during the inspection. Ms. Drown testified that the she first noticed the SELA construction in December 2016, and the construction took place directly in front of the property. She could feel vibrations and hear the noise from the construction as it took place. She also began to notice cracking, which progressively got worse as the construction continued. Once the construction was finished, the damages stopped.

Damages

Gurtler Bros. estimates it will take $43,073.24 to repair the damages to Unit B. The Court finds this amount to be excessive. Gurtler Bros. included in its estimate repairs for the floors of the unit, repairing/repainting in every room of the home, and moving expenses. Ms. Drown testified that the majority of her damages were focused in the rooms closest to the construction site—which are the kitchen and living areas.

Property Damage	
Gurtler Bros. Estimate	$43,073.24
Repairs/Expenses Unrelated to SELA	($28,916.66)
Total	**$14,156.58**

Dr. Wade Ragas estimated that Ms. Drown suffered a loss of $0.47 per foot for a period of eighteen months.

Loss of Use and Enjoyment	
Total (18 months)	**$9,619.02**

Total Damages for 2501 Napoleon Avenue, Unit B	
Property	$14,156.58
Loss of Use and Enjoyment	$9,619.02
Total	**$23,775.60**

9. Dr. Bryan—2501 Napoleon Avenue, Unit C

Facts

Dr. Bryan Payne purchased Unit C in June of 2010. SELA construction began in front of the property in 2012, and Dr. Payne began noticing cracks in 2013. Mrs. Mehgan Payne testified that the cracks widened while construction was on-going and that no new damages have appeared after the construction stopped. Mrs. Payne testified that trucks and large equipment would travel in front of the property to the construction site and she could feel vibrations from the construction activities sporadically each week.

Damages

Gurtler Bros. estimates it will take $49,373.68 to repair the damages at 2501 Napoleon Avenue, Unit C. The Court finds this amount to be excessive. Gurtlers Bros. included in its estimate repairs to the floors of the unit, repairing/repainting every room of the unit, and moving expenses.

Property Damage

Gurtler Bros. Estimate	$49,373.68
Repairs/Expenses Unrelated to SELA	($26,489.81)
Total	**$22,883.87**

Dr. Wade Ragas estimated that the Paynes suffered a loss of $0.56 per foot for forty-one months.

Loss of Use and Enjoyment

Total (41 months)	**$26,105.52**

Total Damages for 2501 Napoleon Avenue, Unit C

Property Damages	$22,883.87
Loss of Use and Enjoyment	$26,105.52
Total	**$48,989.39**

10. Jori Zlatkiss—2501 Napoleon Avenue, Unit D

Facts

Ms. Jori Zlatkiss began residing at 2501 Napoleon Avenue, Unit D in May 2013. She testified that the unit was in good condition at the time she moved into the condo. However, the Gurtler Bros. inspection reports from 2009 and 2013 indicate that the unit had damages from foundation movement. Sewell, Ex. D9; D10. Ms. Zlatkiss first noticed the construction a few months after moving into the unit. She testified that the construction ended somewhere in the middle of 2016. Ms. Zlatkiss stayed home most days during the SELA construction. The noise from the construction activities often kept her awake and worsened her migraines.

Damages

Gurtler Bros. estimates it will take $42,674.65 to repair the damages at 2501 Napoleon Avenue, Unit D. The Court finds this amount to be excessive. The Gurtler Bros. estimate includes repairs to the floors, repairing/repainting of every room of the unit, and moving expenses.

Property Damage

Gurtler Bros. Estimate	$42,674.65
Repairs/Expenses Unrelated to SELA	($25,582.22)
Total	**$17,092.43**

Dr. Wade Ragas estimated that Ms. Zlatkiss suffered a loss of $0.56 per foot for a period of thirty-three months.

Loss of Use and Enjoyment	
Total (33 months)	**$21,011.76**
Total Damages for 2501 Napoleon Avenue, Unit D	
Property Damages	$17,092.43
Loss of Use and Enjoyment	$21,011.76
Total	**$38,104.19**

11. Leon Greenblatt—2601-03 & 2605 Napoleon Avenue

Facts

2601-03 Napoleon Avenue and 2605 Napoleon Avenue are over ninety years old. Greenblatt, Ex. D9, p. 3. Mr. Leon Greenblatt purchased the properties in 1979. Mr. Greenblatt sold 2605 Napoleon Avenue in 2017 for $290,000.

Ms. Barbra Page resided upstairs in 2605 Napoleon Avenue for about twenty years until she left in 2016. No one else resided at 2605 Napoleon after Ms. Page moved out the apartment. Mr. Greenblatt did not charge her rent during the time she resided there. Mr. Earl Youngblood resided downstairs at 2605 ½ Napoleon Avenue. When Mr. Youngblood moved out, his daughter, Ms. Lisa Youngblood, took his place as tenant. Mr. Greenblatt charged the Youngbloods $700 per month in rent during the time each resided at the property. Ms. Youngblood testified that 2605 ½ had a water intrusion which resulted from the upstairs front porch separating from the building and water seeping into the crack. She testified that this water intrusion began sometime in 2014 or 2015. Cracks also formed on the walls in the interior of her unit. In February of 2018, after Mr. Greenblatt had sold the property, Ms. Youngblood moved to 4327 South Robertson Street, which is also owned by Mr. Greenblatt, because water had begun to intrude into the apartment again. Greenblatt, Ex. P29, p. 13.

2601-03 Napoleon Avenue contains a dry-cleaners and a set of apartments. Mr. Greenblatt leased the dry-cleaners to Mr. Nguyen and charged him $2000 a month in rent. There was no written lease between the two; everything was agreed to orally. Mr. Greenblatt testified that Mr. Nguyen's business suffered during the SELA construction. Mr. Greenblatt agreed to reduce Mr. Nguyen's rent to $1000 during the construction. At one point, Mr. Greenblatt did not charge Mr. Nguyen any rent. Counsel for Mr. Greenblatt asserts that Mr. Greenblatt charged reduced rent for a period of thirty-six months and that he did not collect any rent for a period of twelve months. Greenblatt, Ex. P31.

Mr. Greenblatt hired Michael Prado to repair the damages at his two properties. Mr. Prado testified that he worked on repairs beginning in late 2015 until late 2016. He also testified that the SELA construction was on-going while he was performing repairs, and he would have to repair areas that were re-damaged from the construction vibrations. Some of the repairs performed at 2605 Napoleon Avenue included repairing the sheet rock and plaster, filling and smoothing over cracks, painting the walls, repairing leaks from the roof, and repairing the buckling floors. The repairs performed at 2605 ½ and 2601-03 Napoleon Avenue mainly involved repairing, smoothing, and touching up cracks in the sheetrock. Despite these extensive repairs, Mr. Beau Williams performed a subsequent investigation and opined that the properties required an additional $51,000 in repairs. Greenblatt, Ex. P7; P8.

Damages

Dr. David Sykora testified that both the Greenblatt properties were seventy-five feet from the sheet piles and eighty feet from the timber piles. Further, both properties were in the USACE defined area of potential effect. Both Holt Fastring and William D. Hebeisen opined that the damages at 2601-03 and 2605 Napoleon Avenue were a result of the SELA construction occurring in front of the building. *See* Greenblatt, Ex. P4; P17. Beau Williams relied on both of these reports for his assessment. *See* Greenblatt, Ex. P8-P9. Mr. Greenblatt offered into evidence a series of canceled checks and receipts for the repairs made to the properties, Greenblatt, Exs. P11-P14; P31. In addition to the repairs already made, Mr. Beau Williams estimated that it would take an additional $51,000 to completely repair the Greenblatt properties. According to his post-trial brief, Mr. Greenblatt is seeking a total of $153,281.55 for past and future property damage costs. The Court finds this amount to be excessive.

While the SELA construction did most likely damage the Greenblatt properties, the Court finds it difficult in this case to attribute which damages are related to SELA. The fact that there are no pre-construction reports makes this task especially difficult. Mr. Fastring and Mr. Hebesien's reports each only consist of one page and describe the damages at the property generally. *See* Greenblatt, Ex. P4; P17. Mr. Greenblatt repaired many of the damages observed by these experts, but he does not have a record of the *specific* repairs made to the properties. Mr. Greenblatt supplies the Court with receipts for various purchases he claims were related to repairing the SELA construction damage. However, it is almost impossible for the Court to determine whether each and every purchase on these receipts are related to the SELA construction.

SWB argued in its post-trial brief that some of these receipts are for items which should be considered improvements, such as new appliances and a whirl pool tub. Additionally, Mr. Prado finished his repairs of the property in late 2016, which is around the time the SELA construction ended as well. Therefore, the Court finds it is unnecessary to award damages for additional repairs.

Property Damage	
Greenblatt's claim	$155,281.55
Additional Repairs	($51,000.00)
Receipts	($9,852.04)
Total	**$94,429.51**

Mr. Greenblatt also claims $60,000 in lost rents from the dry cleaners at 2601 Napoleon Avenue. Counsel for Mr. Greenblatt asserts that Mr. Greenblatt charged reduced rent for a period of thirty-six months, and he did not collect any rent for a period of twelve months. Greenblatt, Ex. P31. However, Mr. Greenblatt has not provided any corroborating evidence to support this. In his deposition, Mr. Greenblatt testified that he did not have any records other than his bank statements which would show the rent he collected from Mr. Nguyen. Greenblatt, Ex. P28, pp. 54-55. Mr. Greenblatt also testified that he could not recall the periods of time when he reduced the rent or did not charge rent. *Id.* The only evidence Mr. Greenblatt uses to support this claim is his and his wife's testimony. Therefore, the Court cannot award damages for lost rents.

Further, in his post-trial brief, Mr. Greenblatt makes claims for the diminution of property value, pain and suffering, and emotional distress. Mr. Greenblatt did not provide any evidence during trial that would support these claims. Therefore, the Court also cannot award these damages.

Total Damage for 2601-03 and 2605 Napoleon Avenue	
Total	**$94,429.51**

B. Comparative fault

1. Comparative Fault

SWB argues in its post-trial brief that this Court must assess a portion of fault on USACE and other nonparties under Louisiana Civil Code articles 2323 and 2324. Simply put, however, SWB failed to present sufficient evidence to allow this Court to find USACE or other nonparties at fault. The evidence shows that the SELA Project is owned by SWB. It is not a project that is exclusively within the control of the federal government. *See Holzenthal*, 950 So. 2d at 68.

The issue of contractor liability was discussed in *Holzenthal. Id.* at 80-81. As a matter of law, a contractor on a state or federal project who complies with the project's plans and specifications is not liable for damages to the property of third parties. *Holzenthal*, 950 So. 2d 55, 80-81 *citing Yearly v. W.A. Ross Construction* Co., U.S. 18, 60 S.Ct. 413, 84 L.Ed. 554 (1940); La. R.S. 9:2771. This Court does not recall hearing testimony that the contractors deviated from the SELA Project specifications. A party asserting comparative fault bears the burden of proof by a preponderance of the evidence that the other party's fault was a cause in fact of the damage. *Pruitt v. Nale*, 45, 483 (La. App. 2nd Cir. 8/11/2010), 46 So. 3d 780, 783; [citations omitted]. This Court finds SWB has failed to carry its burden of proving that another party was at fault.

RENDERED, READ, AND SIGNED this 27 day of November, 2018, in New Orleans, Louisiana.

HONORABLE NAKISHA ERVIN-KNOTT
JUDGE, CIVIL DISTRICT COURT